No. 84-35

In the Supreme Court of the United States

OCTOBER TERM, 1984

PENYU BAYCHEV KOSTADINOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an employee of Bulgaria's New York trade office is entitled to diplomatic immunity from criminal prosecution for attempted espionage and conspiracy to commit espionage.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 734 F.2d 905.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted on September 30, 1983, for attempted espionage and conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c).[1] On October 6, 1983, petitioner moved to dismiss the indictment

[1] A superseding indictment incorporating minor changes was filed on November 23, 1983. Petitioner had been first charged with these offenses by sworn complaint dated September 24, 1983.

on the ground that he is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3229, T.I.A.S. No. 7502, which entered into force in the United States on December 13, 1972, and under the Diplomatic Relations Act, 22 U.S.C. 254a *et seq.* On January 17, 1984, the district court dismissed the indictment, holding that petitioner is entitled to diplomatic immunity under the Convention and its implementing statute (Pet. App. 20a-50a). The court of appeals reversed (Pet. App. 1a-19a).

1. Petitioner, an employee of the Bulgarian Ministry of Foreign Trade, served as an assistant commercial counselor in Bulgaria's New York trade office. With the permission of the United States, the Bulgarian Legation (later Embassy) in Washington, D.C., opened the office in New York in 1963 in order to promote trade between the two countries. The commercial counselor designated by Bulgaria to head that office was specifically granted diplomatic immunity by the United States, but other employees in the office were not. Pet. App. 3a.

As the court of appeals explained, the record reflects that on September 23, 1983, petitioner met in a Manhattan restaurant with an individual from whom he purchased a secret document entitled "Report on Inspection of Nevada Operations Office," which concerned various security procedures for American nuclear weapons. Petitioner paid the individual $300, arranged to meet the person again to make further payment, and gave the person a list of 30 additional classified documents that petitioner wanted to acquire. Unbeknownst to petitioner, the individual with whom he dealt had been providing information to the Federal Bureau of Investigation. FBI agents recorded the meeting on audiotape and videotape and arrested petitioner as he left the meeting. Petitioner subsequently was indicted

on one count of attempted espionage and one count of conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c). Pet. App. 3a-4a.

2. The district court granted petitioner's motion to dismiss the indictment, concluding that because, in its view, the New York trade office in which petitioner worked was part of the premises of the Bulgarian Embassy, his title "assistant commercial counselor" makes him a member of the staff of the "embassy"[2] and entitles him to diplomatic immunity. Pet. App. 4a.

The court of appeals reversed (Pet. App. 1a-19a).[3] After a thorough review of the terms of the Vienna Convention, the court concluded that petitioner was not a member of Bulgaria's diplomatic mission to the United States and therefore was not entitled to diplomatic immunity. In particular, the court concluded that the district court had misapprehended the Vienna Convention's use of the term "mission" by focusing on petitioner's locus of employment in Bulgaria's New York

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[2] The district court used the term "embassy." Following the lead of the court of appeals, we will use the word "mission," which is the term used by the Vienna Convention. Pet. App. 4a n.1.

[3] When he entered his plea of not guilty, petitioner applied for release on bail pending trial. The district court denied the application on October 19, 1983; the court of appeals affirmed the order on October 28, 1983, and Justice Marshall denied petitioner's application for release on November 4, 1983. (No. A-333; A-333 Application Exhs. B, C). When the district court ordered dismissal of the indictment, it again denied petitioner's application for release on bail pending appeal. After the government filed its notice of appeal, petitioner, on January 30, 1984, renewed his application for release. On February 15, 1984, after further briefing and oral argument, the district court determined that the motion should be treated as a petition for a writ of habeas corpus and granted relief. On February 21, 1984, the court of appeals granted a stay of the district court's order dismissing the indictment and of all subsequent orders and ordered an expedited briefing schedule. On March 7, 1984, Justice Blackmun denied petitioner's application for release (No. A-687).

trade office (Pet. App. 7a-8a). The court of appeals explained that, under the Convention, the term "mission" refers to a group of persons sent by one state to another, not to the premises those persons occupy in the receiving state (*ibid.*). Accordingly, the court concluded, the fact that petitioner worked on mission premises in Bulgaria's New York trade office did not in itself mean that he was a member of the "mission" and therefore entitled to diplomatic immunity (Pet. App. 11a-14a).

The court of appeals also concluded that petitioner in fact is not a member of the Bulgarian "mission" for purposes of the immunity conferred by the Vienna Convention. The court explained that Article 7 of the Convention (Pet. App. 55a) allows a sending state to appoint the members of the staff of a mission, subject to restrictions permitted by Articles 9 and 11 (Pet. App. 56a, 57a). Those Articles permit a receiving state to declare not acceptable a person designated to a mission staff, to refuse to accept particular categories of officials, and to limit the size of a mission. Consistent with these provisions, the court explained, the United States "limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commercial counselors based in New York" (Pet. App. 19a; see *id.* at 5a-6a, 11a-19a). The United States instead has confined personnel assigned to diplomatic missions to Washington, D.C. "The only exception to the requirement that members of the diplomatic mission reside and work in Washington is that the commercial counselor may also head up the New York trade office and reside in New York" (Pet. App. 14a).

The court of appeals also found that "[t]he State Department has consistently refused to recognize 'assistant commercial counselors' as having diplomatic immunity and has so notified Bulgaria" (Pet. App. 14a). The

court noted that although the United States had issued a press release in 1963 (at the time of the settlement of financial claims of United States nationals against Bulgaria) announcing that the United States was prepared to authorize the Bulgarian Legation to establish a commercial office in New York to promote trade, the United States shortly thereafter twice informed Bulgarian officials that only the official who would head the New York office, not others employed there, would be entitled to diplomatic immunity (*id.* at 14a-15a). The court also noted that the State Department had repeatedly reminded Bulgaria of this position in 1973 and on several occasions in 1981 and had reiterated this uniform policy to the chief diplomatic officers of all Washington embassies in 1974, 1977 and 1978 (*id.* at 16a-18a). Finally, the court observed that petitioner had never received a diplomatic identity card from the State Department and never appeared on the official government lists of persons entitled to diplomatic immunity (*id.* at 17a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Indeed, petitioner concedes (Pet. 7) that the case is one of "first impression." In addition, the conclusion reached by the court of appeals is consistent with the longstanding position of the Department of State, repeatedly conveyed to the Government of Bulgaria, that persons in petitioner's position do not have diplomatic status and therefore are not entitled to diplomatic immunity. Review by this Court therefore is not warranted.

1. Petitioner first contends (Pet. 8-11) that the United States and Bulgaria entered into a "bi-lateral agreement" in 1963 that requires that he be afforded diplomatic immunity and that the court of appeals was required to respect that "agreement" under this Court's

decisions in *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink*, 315 U.S. 203 (1942); and *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981). We fully agree with petitioner that the courts must respect binding Executive agreements, such as those involved in *Belmont*, *Pink* and *Dames & Moore*. In this case, however, there simply is no such agreement with Bulgaria extending diplomatic status or immunity to persons in petitioner's position.

Petitioner bases his argument on a statement issued by the United States in a press release in 1963 (Pet. App. 15a), at the time the United States and Bulgaria entered into a settlement of claims of United States nationals against Bulgaria (Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, July 2, 1963, 14 U.S.T. 969, T.I.A.S. No. 5387; see *Dames & Moore* v. *Regan*, 453 U.S. at 680 n.9). The portion of the press release upon which petitioner relies stated (Pet. App. 15a):

> The United States is prepared to authorize the Legation of the People's Republic of Bulgaria to establish in New York a commercial office which would have the purpose of promoting trade between our two countries. Both Governments will be prepared to facilitate the travel of commercial representatives and officials interested in increasing trade.

Petitioner contends that the authorization for Bulgaria to establish a commercial office in New York, referred to in the press release, was a quid pro quo for the claims settlement sought by the United States and therefore must be viewed as part of a broader agreement that confers diplomatic immunity on him. This argument fails for two reasons.

a. The circumstances establish that the United States' decision to permit Bulgaria to open a commer-

cial office in New York in fact was not part of the Claims Settlement Agreement. The formal Claims Agreement between the two Nations regarding the settlement of claims makes no reference to the establishment of trade offices. Nor was the United States' press release regarding the New York trade office formally published in connection with the Claims Agreement, even though an exchange of diplomatic notes on other matters arising between the two Nations was published along with the Claims Agreement and registered with the United Nations (14 U.S.T. 977-982; 479 U.N.T.S. 245), as required by domestic and international law in the case of binding agreements.[4]

Moreover, the language of the statement on trade relations itself does not suggest that it is a formal binding agreement. It simply recites that the conclusion of an Agreement on financial claims and other matters "removes a significant obstacle to the establishment of more normal relations," that "[c]onditions for the expansion of peaceful trade have therefore been improved," and that "[i]t is the view of both Governments that the expansion of peaceful trade would be mutually beneficial" (Gov't C.A. App. 183). It was in this climate that the statement then proceeded to announce that the "United States is prepared to authorize" the Bulgarian Legation to establish a New York commercial office to promote trade (*ibid.*). This language is nothing more than unilateral expression of intent by the United States as part of the evolving dialogue and relations be-

[4] This publication was made pursuant to 1 U.S.C. 112a, which requires the publication in U.S.T. of treaties and international agreements other than treaties that have been "signed, proclaimed, or with reference to which any other final formality has been executed." Article 102 of the United Nations Charter (59 Stat. 1052) requires that all international agreements be registered with the Secretariat of the United Nations and published by it.

tween the two Nations, expressing the hope that trade and peaceful relations would be furthered as a result. It does not state that the United States had "agreed" in a binding fashion to the opening of a trade office, let alone one whose officials would have full diplomatic status.

Finally, the diplomatic history of the Claims Settlement Agreement refutes the suggestion that the press release on trade relations was actually part of the Agreement. Consistent with the desire of the United States to confine the Agreement to the matter of claims settlement, the Government of Bulgaria agreed to eliminate the words "to improve also their economic relations" from the preamble to the Claims Settlement Agreement (Gov't C.A. App. 202). Contemporaneous State Department documents also explain that the statement on trade relations, embodied in the press release, was "not an integral part of the agreement" (*id.* at 210; see also *id.* at 193, 200). The diplomatic history, like the language of the press release itself, instead shows that the Claims Settlement Agreement had simply removed an obstacle to improved trade relations, including the establishment of a Bulgarian trade office in New York, and that the statement expressed the United States' "favorable attitude" toward improved trade relations (Gov't C.A. App. 188-189, 195, 196, 200, 210). These characterizations refute the suggestion that the United States had formally stipulated to the opening of a New York trade office as part of a binding international agreement enforceable by a court.

b. Assuming arguendo, however, that the 1963 press release constituted or memorialized a binding bilateral agreement to permit Bulgaria to open a New York trade office, that agreement still would have no bearing on this case because it does not purport to confer diplomatic status or immunity on persons who might work in

that office. In fact, the statement does not even address those questions.

Moreover, shortly after issuance of the press release in 1963 and again in early 1964, the United States notified Bulgaria that only the Bulgarian Commercial Counselor in Washington, who also heads the New York office, would be entitled to diplomatic immunity. No one else employed in the New York office would be so entitled. Pet. App. 15a.[5] Bulgaria was reminded of this policy in early 1973 (Pet. App. 16a & n.14) and again in 1974, 1977 and 1978, when the United States by circular notes to all embassies in Washington reiterated its policy that all mission personnel entitled to diplomatic privileges, except the senior economic, financial and commercial officers in New York, must reside in the Washington, D.C. area (Pet. App. 16a).

The position of the United States following Bulgaria's sending of petitioner to replace a commercial counselor in New York in 1979 was the same. In January 1981, the State Department restated its position in connection with another counselor in Bulgaria's New York trade office (Gov't C.A. App. 130). In April 1981, following the arrest in Los Angeles of a Bulgarian trade office employee, the State Department again notified Bulgaria of its policy that only the head of the New York office was accredited as a member of the diplomatic staff and accorded privileges and immunities un-

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[5] As a policy matter, the Department of State requires diplomatic missions to be located in the District of Columbia to prevent the proliferation around the country of offices and individuals with diplomatic status (Pet. App. 18a n.19). It recognizes, however, that New York is an appropriate place to maintain an office for countries desiring to expand trade with the United States. To accommodate these two objects, the United States has allowed such New York offices to be established, but without extending diplomatic status to anyone employed in them except for the ranking commercial, economic, or financial officer (Pet. App. 14a).

der the Vienna Convention (*id.* at 131). And in May 1981, a high-ranking Bulgarian official specifically acknowledged that his government understood that the United States "considered only [the] chief of [the] trade mission in New York to be [a] member of [the] diplomatic staff of [the] embas[s]y," although the Government of Bulgaria urged a contrary position (*id.* at 134).

This record, beginning contemporaneously with the issuance of the press release in 1963, conclusively refutes any suggestion that the United States intended the press release to confer diplomatic immunity on commercial officers in New York, such as petitioner, or that the Government of Bulgaria might have believed that the United States was of that view.[6] In these circumstances, petitioner had ample notice that he would be subject to criminal prosecution if he engaged in acts of espionage against the United States. In any event, the court of appeals' concurrence with the State Department's construction of the press release pertaining to trade relations with a single country does not warrant review by this Court.

2. Petitioner also contends (Pet. 12-19) that the Vienna Convention on Diplomatic Relations requires the United States to grant him immunity from prosecution. However, this argument in turn rests on the premise that the 1963 press release required the United States to treat commercial officers in the Bulgarian trade office in New York as full members of Bulgaria's diplomatic mission entitled to diplomatic immunity. See

[6] This consistent position also defeats petitioner's claim (Pet. 18 n.*) that the United States accepted him as a member of the staff of the mission entitled to diplomatic immunity. The United States government issued petitioner an A-2 visa, which does not necessarily confer diplomatic immunity. See 8 U.S.C. 1101(a)(15)(A)(i) and (ii); 22 C.F.R. 41.12. Moreover, after his arrival, petitioner's name never appeared on the blue or white lists that identify those individuals who have diplomatic immunity. Pet. App. 17a.

Pet. 13, 17, 18. As we have explained, that premise is plainly in error.

If the press release is therefore disregarded, it is clear, as the court of appeals held, that the Vienna Convention itself does not require that assistant commercial counselors such as petitioner be accorded diplomatic status or immunity. Article 11 expressly permits the receiving state to require that the size of a mission be kept within reasonable limits and, on a nondiscriminatory basis, to refuse to accept officials of a particular category (Pet. App. 57a). As the court of appeals explained (Pet. App. 19a):

> The United States did precisely what Article 11 permits. It limited the size of the Bulgarian mission by refusing to accept as members of that mission officials of a certain category, namely, assistant commercial counselors based in New York. Furthermore, it did so on a nondiscriminatory basis.

Moreover, Article 12 provides that the sending state may not establish offices forming part of the mission in localities other than those in which the mission itself is located without the consent of the receiving state (Pet. App. 58a). Consistent with this authority, the United States has consented to the establishment by Bulgaria of a trade office in New York, but on the understanding that only the head of that office, not its other employees, will be regarded as members of the mission entitled to diplomatic immunity. Indeed, petitioner concedes (Pet. 14) that the background of the Vienna Convention shows that not all persons performing commercial functions would automatically be covered by the Convention and entitled to diplomatic immunity under it, but rather that only those members who were part of the diplomatic mission would be covered. In the instant case, the United States has consistently made clear that employees in the New York trade office are

not regarded as part of the diplomatic staff entitled to diplomatic immunity (Gov't C.A. App. 127, 129, 130, 131, 132, 135).

In addition, Article 12 reflected then current international practice, as was reported to the Secretary of State by the United States delegation to the Vienna Conference. Since 1939, the only foreign diplomatic officers the United States had permitted to reside in New York were the ranking commercial, economic, or financial officers (Pet. App. 11a), an arrangement that presumably was thought to be consistent with international practice; and the background of the Senate's ratification of the Convention reflects the understanding that members of trade missions would not be covered (Sen. Exec. Rep. 6, 89th Cong., 1st Sess. 10 (1965), quoted at Pet. App. 11a n.8). That practice, as we have shown, continued after the Convention entered into force in the United States in 1972 and continues to this day. This construction of the Convention by those charged with its implementation is entitled to great weight. *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982). Petitioner's effort to overturn this longstanding construction is without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984